

**STATE OF FLORIDA
STATE RETIREMENT COMMISSION**

**CLOVIS WATSON, JR. and
CITY OF ALACHUA,**

Petitioners,

vs.

Case No. R08-13612-JAX

**STATE OF FLORIDA,
DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,**

Respondent.

_____ /

FINAL ORDER

This cause came before the State Retirement Commission upon appeal by Petitioner, Clovis Watson, Jr., of the State Retirement Director's denial of his request for membership in the Special Risk Class of the Florida Retirement System while employed as a city manager.

Upon notice to the parties, the Commission held a hearing on May 19, 2009, in Tallahassee, Florida. Commission members present were Chair Alice Myers and Commissioners Millie Seay and Ernest Doster. Legal advisors to the Commission were Ann Cocheu, Assistant Attorney General, and Lee Ann Gustafson, Assistant Attorney General. Petitioner was represented by Rod Smith, Esquire, and Respondent was represented by Elizabeth Stevens, Esquire. Also present was the City of Alachua, who joined this case as a Petitioner at the scheduled hearing, represented by Marian Rush, Esquire.

Petitioner testified on his own behalf and presented the testimony of Traci Cain, Joel DeCoursey, and Bonnie Burgess. Respondent presented the testimony of Joyce Morgan and

Terry Baker (by proffer).

The exhibits accepted into evidence were as follows:

Petitioner's Exhibits

Petitioner's Exhibit 1, 2006 FRS Retirement Guide; Petitioner's Exhibit 2, Respondent's Response to Petitioner's First Request for Admissions dated April 13, 2009; Petitioner's Exhibit 3, Composite Personnel File; Petitioner's Exhibit 4, Employer Contracts; Petitioner's Exhibit 5, Summary Final Judgment for Defendant with decision, entered in Alachua County; Petitioner's Exhibit 6, Petitioner's Request to Produce with responses; Petitioner's Exhibit 7, Petitioner's Complaint filed in Leon County Circuit Court with attachments.

Respondent's Exhibits

Respondent's Exhibit 1, Excerpt from FRS Employer Handbook pages 21-22 dated 2009; Respondent's Exhibit 2, Excerpt from FRS Employer Handbook pages 16-17 dated 2002; Respondent's Exhibit 3, Letter from Gib Coerper to Joyce Morgan dated November 13, 2007; Respondent's Exhibit 4, Respondent's First Request for Admissions dated March 9, 2009; Respondent's Exhibit 5, Petitioner's Response to Respondent's First Request for Admissions dated March 17, 2009; Respondent's Exhibit 6, Petitioner's Answers to Interrogatories dated December 9, 2009; Respondent's Exhibit 7, The City of Alachua Organizational Charts; Respondent's Exhibit 8, The City of Alachua City Manager Position Description; Respondent's Exhibit 9, Petitioner's City of Alachua Performance Evaluations; Respondent's Exhibit 10, FDLE Global Profile Sheet; Respondent's Exhibit 11, Affidavit of Separation filed with FDLE dated September 7, 2007; Respondent's Exhibit 12, Letter from Michael Crews to Clovis Watson, Jr. dated July 18, 2007; Respondent's Exhibit 13, Letter from Rod Smith to Michael Crews dated August 1, 2007; Respondent's Exhibit 14, undated Letter from Grace Jaye to Rod

Smith; Respondent's Exhibit 15, Letter from Rod Smith to Grace Jaye dated September 7, 2007; Respondent's Exhibit 16, Letter from Grace Jaye to Rod Smith dated September 12, 2007.

Joint Exhibits

Joint Exhibit 1, Summary Final Judgment for Defendants in Case 01-07-CA-824; Joint Exhibit 2, Letter from Rod Smith to Joyce Morgan dated July 17, 2007; Joint Exhibit 3, Letter from Gib Coerper to Joyce Morgan dated August 9, 2007.

ISSUE

Whether Petitioner is eligible for membership in the Special Risk Class or Special Risk Administrative Support Class of the Florida Retirement System while employed as a city manager.

FINDINGS OF FACT

1. Petitioner was employed as a police officer with the Alachua Police Department ("APD") from 1983-2002. While Petitioner was employed with the APD, he was reported by the City to the Division as a member of the Special Risk Class of the Florida Retirement System ("FRS"). (T: 61-63, 158)

2. In August 2002, Petitioner left his position at the APD and became the city manager of the City of Alachua ("City").

The City and Petitioner's Attempt to Secure Special Risk Class Membership Without Notifying the Division

3. The Division has specific instructions regarding what needs to take place in the event a member participating in the Special Risk Class changes positions. These instructions are set forth in a handbook published by the Division for use by FRS employers ("employer handbook"). This handbook is available online to all employers (including municipalities) that participate in the FRS.

4. The City admitted receiving a copy of this handbook.

5. The employer handbook provides that when an FRS member participating in the Special Risk Class moves to a different position, and the new position is not one of the preapproved positions listed in the handbook, an application for Special Risk Class membership must be submitted to the Division for the member. This procedure was in place in 2002 when Petitioner became city manager.

6. The city manager position is not a preapproved Special Risk Class position.

7. At the time Petitioner became the city manager, neither the City nor Petitioner filed an application for Special Risk Class membership for Petitioner.

8. Moreover, the Division was not notified in any manner at this time of Petitioner's position change from police officer to city manager.

9. The contract between the City and Petitioner dated August 28, 2002 provides that Petitioner was to be employed as the "City Manager/Police Commissioner." This contract attempted to mandate the Division to pay Special Risk Class retirement benefits to Petitioner while Petitioner is employed as a "City Manager/Police Commissioner." This provision has remained through several amendments of the contract.

10. The City failed to consult the Division prior to entering into this contract.

11. Petitioner also failed to consult the Division prior to entering into this contract despite his admitted awareness that the City was in a transition period and did not have a human resources or personnel department.

12. The Division has never been a party to any of Petitioner's employment contracts.

13. Both the City and Petitioner now admit that they could have handled this situation better.

14. After Petitioner became the city manager in 2002, the City continued to report Petitioner as a Special Risk Class member to the Division and as a full-time law enforcement officer to the Florida Department of Law Enforcement ("FDLE"). The Division was in no way aware that Petitioner was actually a city manager.

15. In 2004, the City contacted the Division to request an additional six months of Special Risk Class retirement service credit for Petitioner. At this time, the Division reviewed Petitioner's FDLE global profile sheet which indicated that he was currently employed as a full-time law enforcement officer.

16. In 2007, FDLE conducted an investigation and determined that Petitioner was in violation of Article II, Section 5(a) of the Florida Constitution (the dual office-holding provision) because Petitioner was acting as both a law enforcement officer and a city manager.

17. In a letter to FDLE addressing this determination, Petitioner clarified that, as a matter of law, he resigned from his position as a police officer when he accepted the position of city manager.

18. On Sept. 7, 2007, the City filed an Affidavit of Separation with FDLE. This affidavit officially separated Petitioner from his full-time law enforcement officer position and from his employment with APD retroactive to June 5, 2002.

19. Since Petitioner is no longer a law-enforcement officer, his law enforcement certification is inactive and in a special status. Law enforcement certification is not required for the city manager position.

20. Because Petitioner's certification is in special status, he is not a certified officer for the APD and can only affiliate with the APD to complete mandatory retraining that he must

report during his tenure as city manager. He cannot participate in any employment assignments on behalf of the APD.

21. In 2007, Petitioner's employment contract was amended to explain that Petitioner was an "ex officio Police Commissioner" (the contract states that this amendment is retroactive to 2002). The City acknowledged that the ex officio Police Commissioner title was simply to emphasize Petitioner's eligibility of reinstatement to the APD in the event he was not retained as the city manager. Petitioner did not receive any additional compensation for having this title. (P-

22. In May 2007, the Division was notified by a concerned citizen that Petitioner was a city manager, and was thus being improperly reported by the City as a member of the Special Risk Class. Prior to this date, the Division had not been notified of Petitioner's position change.

23. Soon after receiving this information, the Division also received a telephone call from FDLE notifying the Division of the investigation of Petitioner's violation of the dual office-holding provision.

24. In June 2007, the Division determined that since Petitioner was a city manager, he was being incorrectly reported by the City as a Special Risk Class member. Instead, Petitioner belonged in the Senior Management Service Class ("SMSC") of the FRS pursuant to Section 121.055, Florida Statutes. Accordingly, the Division placed Petitioner in the SMSC retroactive to August 2002, the date of Petitioner's city manager employment contract.

25. The Division is not aware of any person who has ever participated in the Special Risk Class while employed as a city manager. To the Division's knowledge, all city managers are members of the SMSC.

26. The Division has repeatedly attempted to return the additional contributions the City paid for Petitioner's inclusion in the Special Risk Class, but the City has refused to accept its refund.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission makes the following Conclusions of Law:

27. The State Retirement Commission has jurisdiction over the parties to and the subject matter of this cause.

28. In cases concerning the application of Special Risk Class membership, the burden of proof is on the member seeking to show entitlement to inclusion in such class. Fla. Admin. Code R. 60R-1.0047. The standard of proof is by the preponderance of the evidence. *See Viele v. Div. of Retirement*, 642 So. 2d 1124 (Fla. 1st DCA 1994); *See Andrews v. Div. of Retirement*, 508 So. 2d 477 (Fla. 1st DCA 1987).

29. The FRS was created by the Legislature in 1970, and is codified in Chapter 121, Florida Statutes. This system is a defined benefit system that is funded by employer contributions and is comprised of several classes of employees, one being the Special Risk Class. § 121.061, Fla. Stat.

30. The intent of the legislature in creating this class was to recognize and reward the hazardous and physically demanding nature of the work performed by persons employed in specified job categories, such as law enforcement officers, firefighters, and correctional officers. § 121.0515(2)(a)-(c), Fla. Stat. Since Special Risk Class members are often unable to perform their work until normal retirement (30 years of service or age 62), these members are permitted to retire earlier than members of other classes without being penalized (25 years of service or age

55). § 121.0515(1), Fla. Stat. These members also receive higher contribution rates per year of service. § 121.071, Fla. Stat.

31. Sections 121.0515(2)(a)-(g), Florida Statutes, enumerate the specific criteria necessary to qualify as a Special Risk Class member. At issue in this case is subsection (2)(a) which relates to law enforcement officers.

32. To be eligible for Special Risk Class membership as a law enforcement officer, the member must be employed as a law enforcement officer. In addition to this requirement, the member's duties must include the "pursuit, apprehension, and arrest of law violators..., or the member must be the supervisor or command officer of...members who have such responsibilities." § 121.0515(2)(a), Fla. Stat.

33. Petitioner, as a matter of law, resigned from his law enforcement officer position when he accepted the position of city manager. § 943.135(4)(a), Fla. Stat. Since Petitioner is not employed as a law enforcement officer, and has not been since June 2002, he does not meet the requirements for Special Risk Class membership under Section 121.0515, Florida Statutes.

34. In addition to the Special Risk Class, the Legislature also created the Special Risk Administrative Support Class. § 121.0515(7), Fla. Stat. This class allows certain Special Risk Class members who are employed or reassigned to a non-Special Risk Class position to retire after either 25 years of service or 55 years of age (the same as Special Risk Class members). *Id.* Unlike Special Risk Class members, these members do not receive a higher service credit multiplier.

35. A member may only participate in the Special Risk Administrative Support Class if he or she meets the criteria set forth in Florida Administrative Code Rule 60S-1.0054(2)(a). Specifically, a member must be "employed by an agency whose primary purpose is law

enforcement, firefighting, corrections, or emergency medical care, or if the employer has multiple responsibilities, the member must be employed by a unit of the agency whose primary purpose is law enforcement, firefighting, corrections, or emergency medical care.”

36. Petitioner is employed by the City (which has multiple responsibilities), but is not employed by the unit of the City whose primary purpose is law enforcement – i.e., APD. Therefore, he does not qualify for membership in this class.

37. Petitioner alleges that he would not have accepted the city manager position if the City had informed him of his ineligibility to remain in the Special Risk Class, effectively raising an equitable estoppel argument.

38. This tribunal does not have jurisdiction to grant equitable remedies. Section 26.012, Florida Statutes (2008). *See also Strickland v. Div. of Retirement*, DOAH Case No. 03-4031; *Bright v. Div. of Retirement*, DOAH Case No. 03-2142; *Mills v. Div. of Retirement*, DOAH Case No. 03-0744; *Holsten v. Div. of Retirement*, DOAH Case No. 09-1462 (“This tribunal does not have jurisdiction to grant equitable remedies.”)

39. However, even if this Commission had jurisdiction for equitable remedies, Petitioner would have the burden of proving the following elements had been met: (i) a representation by a party as to some material fact, (ii) reliance on that representation by the party claiming estoppel, and (iii) a change in the party’s position caused by his reliance on the representation to his detriment. *E.g., Shaffer v. School Bd. of Martin County*, 543 So. 2d 335 (Fla. 4th DCA 1989).

40. Further, as a general rule, estoppel may be applied against the state only in rare instances and under exceptional circumstances. *E.g. Dolphin Outdoor Advertising v. Dep’t of Transp.*, 582 So. 2d 709 (Fla. 1st DCA 1991). To allege the defense of estoppel against the

Division, a governmental entity, Petitioner must show affirmative conduct by the Division which he relied on to his detriment. *Martin County v. Indiantown Enter., Inc.*, 658 So. 2d 1144 (Fla. 4th DCA 1995); *State v. Hadden*, 370 So. 2d 849 (Fla. 3d DCA 1979) (holding that estoppel cannot be applied against the state for an omission to act, but only in special circumstances which must include a *positive* act on the part of a state official which the aggrieved party had a right to rely and did rely to his detriment).

41. Petitioner did not rely on any representation made by the Division. Instead, he relied on information provided to him by the City.

42. The City is a separate entity from the Division, and representations made by the City cannot be attributed to the Division. *Bright v. Div. of Retirement*, DOAH Case No. 03-2142 ("Although the governmental employers are liaisons between the Division and FRS members, these entities are not considered agents of the Division."). This position has recently been codified by the Legislature. See Chapter 2009-209, Section 1, Laws of Florida. ("Employers are not agents of the...Division of Retirement, and the...Division of Retirement [is] not responsible for erroneous information provided by representatives of employers.")

43. Accordingly, the doctrine of equitable estoppel does not apply.

44. The SMSC is another retirement class created by the Legislature. This class was established in February 1987, after the creation of the Special Risk Class. § 121.055, Fla. Stat. This class is for members who fill senior level management positions assigned by law to the SMSC, or authorized by law as eligible for SMSC. § 121.055, Fla. Stat. Members of this class receive a higher retirement benefit than regular class members. Fla. Admin. Code R. 60S-4.004.

45. When established, this class was only available to state Senior Management Service employees. § 121.0515, Fla. Stat. (1987). However, in January 1990, the legislature

expanded the SMSC to include local agency employees. § 121.055(1)(b), Fla. Stat. In doing so, the legislature required that all city managers be included as mandatory SMSC members. *Id.*

46. Upon discovering that Petitioner had been reported as a Special Risk Class member while employed as a city manager, the Division placed him in the SMSC retroactive to August 2002 (the date Petitioner became city manager).

47. The Senior Management Service Class statute provides an opportunity for certain Special Risk Class and Special Risk Administrative Support Class members appointed to a SMSC position to elect to stay in the Special Risk Class or Special Risk Administrative Support Class. Specifically, Section 121.055(6)(c)3., Florida Statutes, states in pertinent part:

A person who is appointed to a position in the [SMSC] and who is a member of...[the Special Risk Class or Special Risk Administrative Support Class]...may elect to remain in such system or class in lieu of participation in the [SMSC] or optional annuity program. Such election shall be made in writing and filed with the [Division]...within 90 days of such appointment. Any eligible employee who fails to make an election to participate...[in the Special Risk Class or Special Risk Administrative Support Class]...shall be deemed to have elected membership in the Senior Management Service Class. [Emphasis added.]

48. This section specifically states, without exception, that the election shall be made within 90 days of a member's appointment to the SMSC position. When used in a statute, the word "shall" has a mandatory connotation. *Sanders v. City of Orlando*, 997 So. 2d 1089 (Fla. 2008); *Drury v. Harding*, 461 So. 2d 104 (Fla. 1984); *Holloway v. State*, 342 So. 2d 966 (Fla. 1977); *White v. Means*, 280 So. 2d 20 (Fla. 1st DCA 1973); *Steinbrecher v. Better Constr. Co.*, 587 So. 2d 492 (Fla. 1st DCA 1991) (stating that where a provision is accompanied by a penalty for failure to observe it, the provision is viewed as mandatory). Therefore, if an eligible Special Risk Class member wishes to remain in the Special Risk Class instead of transferring to the SMSC, an election must be made within 90 days of appointment to the SMSC position. If the election is not made within 90 days, the member will remain a member of the SMSC.

49. Petitioner admitted that he failed to timely file an election.

50. Knowing this, Petitioner argues that since the Division did not inform him that he was eligible to make an election, the time to elect should be tolled. In essence, Petitioner asserts that the Division should be estopped from denying his request to file an election.

51. As discussed above, this issue is outside of the scope of the Commission's jurisdiction. However, even if this was within the Commission's jurisdiction, Petitioner would have the burden of alleging that he relied on an affirmative representation made by the Division to his detriment. In other words, Petitioner must allege that Petitioner affirmatively did something to make Petitioner miss the 90-day filing deadline. This did not happen. The doctrine of estoppel does not apply.

52. Further, the Division is under no duty to inform FRS members of the law. See *State v. Beasley*, 580 So. 2d 139 (Fla. 1991); *See also Hessler v. Div. of Retirement*, DOAH Case 03-2118.

53. It is axiomatic that this election is only available to employees whose SMSC position would qualify for Special Risk Class or Special Risk Administrative Support Class membership (e.g., Inspector General at FDLE because he is the head of an agency and a law enforcement officer; Director of State Fire Marshall at the Department of Insurance because he is a director of an agency and a firefighter). Otherwise, members would have the ability to abuse these classes (e.g., a member could be employed as a law enforcement officer for 6 months, then move into a non-Special Risk Class position and "elect" to remain in the Special Risk Class). This is obviously not what the law intends.

54. It is clear that the position of city manager does not, in itself, qualify for Special Risk Class or Special Risk Administrative Support Class membership. Therefore, Petitioner is not entitled to this election.

55. Additionally, this provision is found in subsection (6) of the SMSC statute, which establishes the Senior Management Option Annuity Program ("SMOAP"). Therefore, the election under this subsection only applies to those who qualify for SMOAP. As set forth by statute, SMOAP is only available to state employees (as opposed to local employees) § 121.055, Fla. Stat. Since Petitioner is a local agency employee, he does not qualify for SMOAP and thus, is not entitled to make this election.

56. Interpretations of an administrative agency are entitled to great weight and should not be disturbed unless clearly erroneous. *See Ameristeel Corp v. Clark*, 691 So. 2d 473 (Fla. 1997); *Okeechobee Health Care v. Collins*, 726 So. 2d 775 (Fla. 1st DCA 1988). When the agency committed with the statutory authority to implement a statute has construed the statute in a permissible way, the interpretation will be sustained although another interpretation may be possible, or even in the view of some, preferable. *Humhosco, Inc. v. Dept. of Health and Rehabilitative Serv.*, 476 So. 2d 258 (Fla. 1st DCA 1985); *Florida Power Corp. v. Dep't of Env'tl. Regulation*, 431 So.2 d 684 (Fla. 1st DCA 1983). The Commission finds the Division's interpretations of these statutes reasonable, and therefore adopts these interpretations.

57. Petitioner raised the issue of whether the Division's process of placing him in the SMSC was proper. Specifically, Petitioner alleges that he was removed from the Special Risk Class without the opportunity to explain his position regarding entitlement to membership in the Special Risk Class, and prior to being afforded a hearing.

58. Since Petitioner has been afforded a hearing and opportunity to be heard, this issue is moot. *Godwin v. State*, 593 So. 2d 211 (Fla. 1992) (holding that an issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect); *Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings*, 948 So. 2d 705 (Fla. 2007); *MacKendree & Co., P.A. v. Pedro Gallinar & Associates, P.A.*, 979 So. 2d 973 (Fla. 3d DCA 2008); *Carlin v. State*, 939 So. 2d 245 (Fla. 1st DCA 2006).

59. Furthermore, this issue deals with the Commission's subject-matter jurisdiction, which arises solely by virtue of law. It is conferred on a tribunal by constitution or statute, and cannot be created by waiver, acquiescence or agreement of the parties. *Strommen v. Strommen*, 927 So. 2d 176 (Fla. 2d DCA 2006).

60. The jurisdiction of this Commission is limited to written final decisions of the administrator on the merits. § 121.23, Fla. Stat. The statute detailing the requirements for membership in the Special Risk Class provides that if the Division does not designate a member as a Special Risk Class member, the member may appeal to the Commission for designation into this class. § 121.0515, Fla. Stat. Therefore, the issue involving the Division's removal process is outside the scope of the Commission's jurisdiction.

ORDER

Based upon the Findings of Fact and Conclusions of Law, it is

ORDERED AND DIRECTED that the decision of the State Retirement Director denying the Petitioner, Clovis Watson, Jr., membership in the Special Risk Class and/or Special Risk Administrative Support Class while employed as a city manager is **SUSTAINED**. It is **ORDERED AND DIRECTED** that the request of Clovis Watson, Jr. for inclusion in the

Special Risk Class and/or Special Risk Administrative Support Class while employed as a city manager is **DENIED**.

ORDERED AND DIRECTED that this Commission retains jurisdiction of this cause for the purpose of correcting any errors or mistakes in this Final Order arising from inadvertence, oversight, or omission.

This Order constitutes final agency action. The parties are notified that they may appeal this Order by filing a Notice of Appeal, along with the appropriate filing fees, in the District Court of Appeal. Such notice must be filed with the Clerk of the Commission and with the District Court of Appeal within thirty calendar days of the date of this Order which is filed in the records of the State Retirement Commission, as indicated in the Clerk's Certificate below, or further review of this action will be barred.

DONE and ORDERED this 13th day of October, 2009.

STATE RETIREMENT COMMISSION


ALICE C. MYERS, CHAIR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was filed in the records of the State Retirement Commission this 13th day of October, 2009, and that copies were furnished by certified mail to Rod Smith, Esquire, Avera & Smith, L.L.P., 2814 S.W. 13th Street, Gainesville, Florida 32608; Marian Rush, Esquire, Law Office of Rush & Glassman, 11 S.E. Second Avenue, Gainesville, Florida 32601S and Elizabeth Stevens, Esquire, Department of Management Services, 4050 Esplanade Way, Suite 160, Tallahassee, Florida.



BRANDI TANTON, CLERK